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February 1, 2010

The Honorable Joseph A. Greenaway, Jr., U.S.D.J.  
United States District Court  
Martin Luther King Federal Courthouse & Building  
50 Walnut Street  
Newark, New Jersey 07102

Re: BASSEM KANDIL, ET AL. v. Yurkovic, et al.  
Civil Action Number: 06-4701 (JAG-MCA)  
Our File Number: 4-5900.039498

Dear Judge Greenaway:

Please be advised that I represent Defendant Police Officer Gary Yurkovic in the aforementioned matter. Susan K. O'Connor, Esq. represents Defendants City of New Brunswick, City of New Brunswick Police Department, Police Director and Sergeant William Oels, Jr. Michael John Stone, Esq. represents Defendant Officer William C. Oels, III. Gary S. Spagnola, Esq. represents Defendant Officer Anthony Mark Abode. Kindly accept this correspondence on behalf of the aforementioned Defendants (hereinafter "Defendants") in response to Plaintiffs' Opposition (See Document Number 101) to Defendants' pending Motions for Summary Judgment (See Document Numbers 81 through 84). This Reply Brief is being filed in accordance with the Order dated January 15, 2010 signed by the Honorable Madeline Cox Arleo, U.S.M.J. (See Document Number 105).

As noted in the Moving Briefs and Plaintiffs' Opposition, the Supreme Court has opined that Release/Dismissal Agreements may be enforced where (1) they are found to have been voluntarily entered into, (2) there has been no prosecutorial misconduct and (3) where the

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agreement is found to be in the public interest. Newton v. Rumery, 480 U.S. 386, 394 (1987). Plaintiffs concede that the first element of Rumery, concerning the issue of voluntariness, has been satisfied. (See Opp. at p. 6.) Plaintiffs have failed to address the second element, regarding prosecutorial misconduct, and therefore have waived any argument in this regard. Therefore, the remaining issue is the third element, which is whether the agreement is found to be in the public interest. This is an issue to be decided by Your Honor. Berry v. Peterson, 887 F.2d 635, 637 (5th Cir. 1989); Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1215 (3d Cir. 1993).

Plaintiffs' Opposition to the public interest requirement centers on two (2) Ethic Opinions issued by the New Jersey Advisory Committee on Professional Ethics. (See Exhibit K and Exhibit L attached to Plaintiffs' Opposition.) It must be noted from the onset that the second Opinion relied on by Plaintiffs, Opinion 714, was decided on October 27, 2008, which was after Plaintiff Bassem Kandil (hereinafter "Mr. Kandil") and his counsel, Mr. Kobin, agreed to prepare and sign a Release/Hold Harmless Agreement in exchange for his admission into the Pre-Trial Intervention Program (hereinafter "PTI"). The Ethics Opinion was issued after Mr. Kandil and his counsel made the representations to the Honorable Frederick DeVesa, J.S.C. on November 9, 2005 regarding the execution of the Release/Hold Harmless Agreement on November 9, 2005. (See Exhibit L attached to Plaintiffs' Opposition.) Mr. Kandil ultimately executed the Release/Hold Harmless Agreement on March 20, 2007, again prior to the issuance of Opinion 714. In short, Opinion 714 was a post hoc change to the legal rules which the parties had the right to rely upon in making their decisions in 2005. As Ethics Opinion 714 does not apply retroactively, Defendants' conduct cannot be judged by an Ethics Opinion that was issued subsequent to the conduct at issue. Therefore, any and all references to Opinion 714 must be disregarded.

At the time the discussions took place regarding the execution of the Release/Hold Harmless Agreement, the only Ethics Opinion in effect was Opinion 661. However, this Opinion addresses the limited issue of the ability of a **municipal** prosecutor to require a criminal defendant to make certain admissions in a case where probable cause may not exist. Further, Opinion 661 specifically notes that the prosecutor "**demand**ed" that defendant admit to probable cause, lack of excessive force and a waiver of a Civil Rights lawsuit.

In this matter, probable cause is not in question because the Grand Jury indicted Mr. Kandil. The Middlesex County Grand Jury returned Indictment 04-12-1694 against Mr. Kandil charging him with one (1) count of disarming Police Officer Yurkovic, in violation of

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N.J.S.A. 2C:12-11, a second degree crime, two (2) counts of aggravated assault on Officer Yurkovic and Officer Oels, respectively, in violation of N.J.S.A. 2C:12-1(b)(5), third degree crimes, and two (2) counts of resisting arrest as to Officer Yurkovic and Officer Oels, respectively, in violation of N.J.S.A. 2C:29-2(a)(3), third degree crimes. (See Exhibit AA, attached to Defendants' Motions for Summary Judgment, a copy of Indictment Number 04-12-01694 relative to State v. Kandil.) The return of an indictment establishes probable cause as a matter of law. State v. Overbeck, 618 F.Supp. 196, 198 (D.N.J. 1985); U.S. v. Romano, 706 F.2d 370, 374 (2d Cir. 1983); U.S. v. Ciambrone, 601 F.2d 616, 622 (1979); see also Rose v. Bartle, 871 F.2d 331, 353 (3d Cir. 1989) ("a grand jury indictment or presentment constitutes prima facie evidence of probable cause to prosecute...")

Second, the charges filed against Mr. Kandil were being prosecuted by a County Prosecutor, not a municipal prosecutor. It was not the Prosecutor's Office which requested or demanded the execution of a Release/Hold Harmless Agreement, but the Court. Further, the element of intimidation or coercion that can arise when a prosecutor is negotiating a plea bargain with a criminal defendant was not present. See Opinion 661.

As will be set forth in detail infra, there was a public interest in the plea bargain negotiated in this matter, which benefited both parties. On December 17, 2004, Mr. Kandil appeared at a pre-arraignment conference and was provided with discovery and a written plea offer from the Middlesex County Prosecutor's Office of non-custodial probation. (See Exhibit BB, attached to Defendants' Motions for Summary Judgment, a copy of the correspondence dated December 17, 2004 from Sheree V. Pitchford, Assistant Middlesex County Prosecutor and Exhibit EE, attached to Defendants' Motions for Summary Judgment, a copy of the relevant pages of the deposition transcript of Sheree V. Pitchford, T17:6-18:5.) On January 20, 2005, nearly six (6) weeks after he received the plea offer, Mr. Kandil was arraigned on the Indictment in the presence of counsel. (See Exhibit DD, attached to Defendants' Motions for Summary Judgment, a copy of the Arraignment/Status Conference Order dated January 20, 2005 and Exhibit EE, attached to Defendants' Motions for Summary Judgment, T20:19-21:3.) Mr. Kandil and his counsel engaged in discovery with the Prosecutor's Office which was discussed at two (2) conferences on July 14, 2005 and August 4, 2005 before the Honorable Melvin L. Gelade, J.S.C. (See Exhibit 1, attached hereto, a copy of the relevant pages of the deposition transcript of Sheree Pitchford, T29:11-17, T32:2-22.)

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Thereafter, on September 22, 2005, Mr. Kobin provided reciprocal discovery concerning the motive of Officer Yurkovic to arrest Mr. Kandil. (See Exhibit 2, attached hereto, a copy of the relevant pages of the deposition transcript of Marcia Silva, T13:22-25, T15:18-21.) Assistant Prosecutor Silva reviewed the reciprocal discovery and discussed same with Executive First Assistant Prosecutor Ronald Abramowitz. (See Exhibit 2, attached hereto, T18:1-3.) Prosecutor Abramowitz reviewed the discovery and did not see a problem which would impact the prosecution of this matter. (See Exhibit 2, attached hereto, T19:15-19.) Nevertheless, Prosecutor Abramowitz instructed Ms. Silva to investigate the allegations contained in the discovery provided by Mr. Kobin. (See Exhibit 2, T19:8-14.) Ms. Silva further investigated the allegations contained in Mr. Kandil's reciprocal discovery and determined that there was no improper motive by Officer Yurkovic and that the claim by Mr. Kandil's counsel was unfounded. (See Exhibit 2, T20:12-16.)

At the time of the next status conference on October 18, 2005, the Honorable Frederick J. DeVesa, J.S.C, Presiding Judge of the Criminal Division, inquired as to the status to which counsel for Mr. Kandil replied:

[a]t this point, Your Honor, I think it would be helpful and I have discussed this with the Prosecutor, to keep the last plea offer open now that discovery seems to be completed, set up a motion schedule, a pretrial motion schedule and then set a trial date for this matter.

(See Exhibit XX, attached to Defendants' Motions for Summary Judgment, T2:17-21.) This exchange with Judge DeVesa directly contradicts Plaintiffs' assertion, in the opposition papers, that Mr. Kandil's only choice was either to accept PTI or proceed to trial. Clearly, the offer of non-custodial probation was still a viable consideration and should be considered by this Court in determining that there was no element of intimidation or coercion similar to the factual circumstances which gave rise to Ethics Opinion 661.

On October 18, 2005, Judge DeVesa also inquired about the status of plea offers.

The Court:           The State is not agreeing to PTI for Mr. Bassem [Kandil]?

Ms. Silva:           Correct, Your Honor.

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The Court: But the State is offering a non-custodial term of probation?

Ms. Silva: Your Honor, that's correct.

. . .

(See Exhibit XX, attached to Defendants' Motions for Summary Judgment, T5:8-14.) Clearly, at the time of the conference, the State was not offering PTI to Mr. Kandil, which further establishes that it was not the Prosecutor's Office who demanded the inclusion of the condition of a Release/Hold Harmless Agreement. Immediately after this exchange, Judge DeVesa requested a conference in chambers. (See Exhibit XX, attached to Defendants' Motions for Summary Judgment, T5:22-25.) Plaintiffs cannot and do not dispute that, at the conference, it was the Judge who suggested that the Prosecutor's Office consider admitting Mr. Kandil into PTI if Mr. Kandil agreed to withdraw his civil claims. (See Exhibit LL, attached to Defendants' Motions for Summary Judgment, T429:14-24, Exhibit MM, attached to Defendants' Motions for Summary Judgment, T49:10-50:20 and Exhibit OO, attached to Defendants' Motions for Summary Judgment, T27:9-28:9, T100:9-14 and Exhibit XX, attached to Defendants' Motions for Summary Judgment, T6:2-20). Again, this essential undisputed fact establishes that it was the Court who made the suggestion, to which Mr. Kandil later agreed. Mr. Kandil applied for admission into PTI at the direction of his attorney immediately following the October 18, 2005 conference. (See Exhibit JJ, attached to Defendants' Motions for Summary Judgment, a copy of the Application for Admission to PTI dated October 18, 2005.)

After the Probation Department recommended that Mr. Kandil not be accepted into the PTI Program, pursuant to the policy of the Prosecutor's Office, Assistant Prosecutor Silva consulted with First Assistant Prosecutor Julia McClure to determine whether the Prosecutor's Office would override the Probation Department's recommendation. (See Exhibit BBB, attached to Defendants' Motion for Summary Judgment, Affidavit executed by First Assistant Prosecutor Julia McClure.) First Assistant Prosecutor McClure approved Mr. Kandil's admission into PTI and authorized Assistant Prosecutor Silva to communicate same to the Court and counsel for Mr. Kandil. (See Exhibit BBB, attached to Defendants' Motion for Summary Judgment.) In this instance, it is undisputed that the Middlesex County Prosecutor's Office had not previously conditioned an entry into PTI with a requirement that the criminal defendant execute a Release/Hold Harmless Agreement. It is also undisputed that the Middlesex County Prosecutor's Office had no policy which required a criminal defendant

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to execute a Release/Hold Harmless Agreement prior to entry into PTI. As such, Ms. McClure's review of the request on behalf of Mr. Kandil was a unique consideration of all the factors pertinent to the prosecution of Mr. Kandil and the public policy issues associated with representing the People of the State of New Jersey, including the public interest favoring plea bargains, upholding the Constitution and State laws, and achieving a measure of justice.

On October 18, 2005, Mr. Kobin's associate, Susan Reed, Esq., explained the PTI Program to Mr. Kandil, explained that, as a condition of his admission to the PTI Program, he had to give up his civil rights to sue the Officers and advised him to speak further with Mr. Kobin. (See Exhibit 3, attached hereto, a copy of the relevant pages of the deposition transcript of Robert Kobin, Esq., T66:3-20 and Exhibit MM, attached to Defendants' Motions for Summary Judgment, a copy of the relevant pages of the deposition transcript of Susan Reed, Esq., T61:22-62:8, T63:17-23). Thereafter, prior to November 9, 2005, Mr. Kobin explained to Mr. Kandil the conditions of his admission into the PTI Program, including the condition that he could not sue the Officers involved in his arrest. (See Exhibit LL, attached to Defendants' Motions for Summary Judgment, T486:3-6 and Exhibit 3, attached hereto, T66:15-23, T67:1-5, T81:7-11, T83:1-11.) Again, the factual circumstances in this matter clearly establish that Mr. Kandil and his attorneys knew that the Court suggested a Release/Hold Harmless Agreement be provided as a condition of PTI and had several discussions, prior to the actual execution of the Order of PTI, concerning the Court's suggestion. These factual circumstances are much different than those presented in Opinion 661.

When Assistant Prosecutor Silva, Mr. Kobin and Mr. Kandil appeared before Judge DeVesa on November 9, 2005, the Court agreed to permit Mr. Kandil to enter PTI based on the condition, among others, that Mr. Kandil would execute a Hold Harmless Agreement, waiving all civil claims against the City of New Brunswick, the officers from the City of New Brunswick and the Prosecutor's Office as a result of his arrest and prosecution. (See Exhibit FF, attached to Defendants' Motions for Summary Judgment, T44:4-12, Exhibit OO, attached to Defendants' Motions for Summary Judgment, T44:14-21 and Exhibit PP, attached to Defendants' Motions for Summary Judgment, T2:20-3:3.) It must be noted that Mr. Kobin is an experienced criminal attorney, having been an Assistant Prosecutor in the Morris County Prosecutor's Office for nine (9) years, and thereafter, a criminal defense attorney in private practice. (See Exhibit 3, attached hereto, T6:12-21, T7:2-23, T20:12-22, T21:5-9.) Prior to or during the November 9, 2005 admission into PTI, Mr. Kobin never expressed his concern to the Court or Assistant Prosecutor Silva that his client should not enter into PTI with one of the conditions being the execution of a Release/Hold



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Harmless Agreement. Instead of advising the Court that he contested the validity of the condition concerning the execution of a Release/Hold Harmless Agreement, Mr. Kobin falsely represented to the Court, on the record, that he agreed to the conditions and would provide the Court with the Release/Hold Harmless Agreement by December 2, 2005. (See Exhibit PP, attached to Defendants' Motions for Summary Judgment, T5:11-6:3.) Mr. Kobin testified that when he agreed to prepare and provide the Release/Hold Harmless Agreement to the Court it was not a misrepresentation to the Court even though it was not his intention to prepare the Release/Hold Harmless Agreement and supply it to the Court. (See Exhibit NN, T183:9-185:25.) Further, Mr. Kobin testified that, when he stated to the Court that he would prepare and provide the Release/Hold Harmless Agreement, he had three (3) options: (1) he hoped that the Release/Hold Harmless Agreement would be forgotten about and the condition would be waived; (2) he could file an application to the Court to remove that condition; or (3) to prepare and provide the Release/Hold Harmless Agreement consistent with his representation to the Court. (See Exhibit NN, 185:9-187:9.)

Despite Ms. Silva's numerous telephone calls following the November 9, 2005 conference to obtain the document, Mr. Kobin intentionally mislead Ms. Silva to believe that the document had been prepared and submitted when he had no such intention. (See Exhibit LL, attached to Defendants' Motions for Summary Judgment, T:452:18-25, T453:21-25, Exhibit MM, attached to Defendants' Motions for Summary Judgment, T93:14-94:9, Exhibit NN, attached to Defendants' Motions for Summary Judgment, T:148:9-12, T149:18-22 and Exhibit OO, attached to Defendants' Motions for Summary Judgment, T59:15-61:24). It was not until sixteen (16) months later when the Probation Department made a Motion to Terminate PTI, due to Mr. Kandil's failure to comply with the condition to provide the Release/Hold Harmless Agreement, that Mr. Kobin finally prepared the Release and his client executed same. (See Exhibit FF, attached to Defendants' Motions for Summary Judgment, T72:24-73:22, T83:11-84:14, Exhibit LL, attached to Defendants' Motions for Summary Judgment, T454:1-6, Exhibit OO, attached to Defendants' Motions for Summary Judgment, T108:2-8 and Exhibit SS, attached to Defendants' Motions for Summary Judgment, a copy of correspondence dated February 7, 2007 from the Brian Stevens, Senior Probation Officer for Superior Court of New Jersey, Probation Division, Hunterdon County to Mr. Kandil, with attached Termination Hearing Notice). If Mr. Kandil had refused to provide the Release/Hold Harmless Agreement, his PTI would have been terminated and the matter would have been returned to the trial list for

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prosecution. Mr. Kobin never challenged this condition of PTI with the trial court or the Appellate Division. Rather than challenge the validity of the condition in State Court or withdraw his client from PTI and allow the criminal case to be tried, Mr. Kobin finally satisfied his November 9, 2005 representation to Judge DeVesa and provided the executed Release/Hold Harmless Agreement.

Similarly, on November 9, 2005, Mr. Kandil knowingly and voluntarily agreed to the conditions of his PTI admission before Judge DeVesa. (See Exhibit LL, attached to Defendants' Motions for Summary Judgment, T437:1-9 and Exhibit PP, attached to Defendants' Motions for Summary Judgment, T3:3-4:3). In fact, on November 9, 2005, Mr. Kandil intended to sign the Release/Hold Harmless Agreement. (See Exhibit LL, attached to Defendants' Motions for Summary Judgment, T437:3-9.) On November 9, 2005, Mr. Kandil was present when Mr. Kobin represented to Judge DeVesa that a Release/Hold Harmless Agreement would be prepared and executed. (See Exhibit PPP, attached to Defendants' Motions for Summary Judgment.) Despite Mr. Kandil's representations to the Court and his intention to execute Release/Hold Harmless Agreement, this Civil Lawsuit was instituted. (See Exhibit LL, T455:22-456:6.) Mr. Kandil was admitted into PTI and gained the benefits of not being prosecuted for the charges contained in the Indictment. Mr. Kandil only signed the Release/Hold Harmless Agreement after the Motion to Terminate PTI was made as, if the Motion was granted, his probation would have been terminated and he would have had to stand trial on the charges contained in the Indictment.

As such, Opinion 661 is not applicable in determining whether Rumery's third element has been met in this case. The facts set forth supra clearly show that the plea negotiations were protracted, that PTI was the result of a plea bargain initiated by the Court and that the parties had equal bargaining power. As Your Honor is aware, there is a public interest in plea bargaining and this plea benefited both parties. Mr. Kandil gained all of the benefits of his bargain, which in hindsight, reveals a calculated strategy by Mr. Kandil and his attorney to enter PTI, avoid criminal prosecution and still proceed with his civil lawsuit. It is fundamentally unfair to reward Mr. Kandil and his attorney for their willful disregard of the Court's authority and to permit those with unclean hands to manipulate the judicial system for their own benefit. Further, it is fundamentally unfair to permit Mr. Kandil and his attorney to rely solely upon Ethics Opinions, which are inapplicable to the issue presented, in a post-hoc attempt to justify their own conduct.



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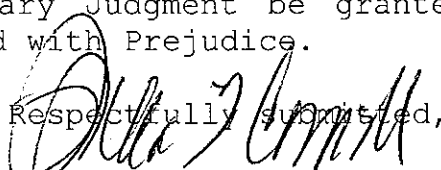
As noted in complete detail in Defendants' Motions for Summary Judgment, in order for a release-dismissal agreement to be enforceable, it must be in the public interest. Rumery, 480 U.S. at 394. The Third Circuit held that "in our recent opinion in Cain, we explained that defendants must show that the prosecutor made the decision to enter into a release-dismissal agreement out of a case-specific concern for the public interest in preserving governmental resources rather than out of concern for the private interests of governmental officials." Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1215 (3d Cir. 1993) (citing Cain v. Darby Borough, 7 F.3d 377, 381 (3d Cir. 1993)).

Plaintiffs, in their Opposition, contend that the Prosecutor's Office never considered the validity of a potential civil lawsuit. Therefore, it is argued that the public interest requirement in Rumery has not been satisfied. However, as set forth in the sworn Affidavit of First Assistant Prosecutor Julia McClure, the public interest factor has been satisfied. The sworn Affidavit of First Assistant Prosecutor McClure remains unrefuted by Plaintiffs.

Further, the facts are clear that Release/Hold Harmless Agreements were not a blanket requirement of the Middlesex County Prosecutor's Office for entry into PTI. In fact, the dismissal of the civil case was suggested and recommended as a solution by Judge DeVesa, not the Prosecutor's Office. The Middlesex County Prosecutor's Office had no policy requiring the execution of such a Release/Hold Harmless Agreement before this matter and did not prepare the subject Release/Hold Harmless Agreement.

The fact remains that both sides, Mr. Kandil and the State, benefited from this plea bargain. Therefore, it is respectfully submitted that the Release/Hold Harmless Agreement must be enforced.

Based on the foregoing, it is respectfully requested that Defendants' Motions for Summary Judgment be granted and Plaintiffs' Amended Complaint be dismissed with Prejudice.

Respectfully submitted,  
  
WILLIAM T. CONNELL

WTC:BCO  
Enclosures

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